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No._____

In the

Supreme Court of the United States

Francisco C. Zamora

Petitioner,

v.

Peter D. Keisler, Acting Attorney General of the United States

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Effective April 1, 1997, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") which repealed §212(c) of the Immigration and Nationality Act ("INA), a waiver available to aliens convicted of any criminal offense so long as a sentence of 5 years or less was served. §304(b), IIRIRA. Congress replaced it with §240A, a more restrictive criminal waiver provision which limited it to only those few felonies which fall outside of the INA's definition of an "aggravated felony" at INA §101(43) and misdemeanors. And, further, §240A restricted the waiver to those aliens who did not commit a crime of moral turpitude within the first 7 years of obtaining any legal status, whether a felony or misdemeanor, another consideration not relevant under §212(c). *See*, 8 U.S.C. §1229b(a)(2), INA §240A(a)(2). This Court in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001) held that where an alien was convicted by a plea of guilty to an offense prior to IIRIRA's effective date, it would be improper for the Attorney General to retroactively apply the repeal of §212(c) under §304(b) of IIRIRA, thus making those aliens who plead guilty to their offenses prior to the effective date of §304(b) of IIRIRA eligible for a §212(c) waiver.

In *St. Cyr*, this Court found that the alien's plea of guilty carried with it a presumed reliance upon the prior law such that it would impose a "severe and obvious retroactive effect" for a court to find that the alien would be ineligible for a §212(c) waiver. *Id.*, at 325, 121 S.Ct. 2271. Thereafter, a majority of the circuit courts of appeals, focusing upon this Court's language concerning "reliance" in St. Cyr, have required that an alien demonstrate a "reliance interest" upon the prior law in

order to be eligible to claim any right or benefit thereunder. In most instances, this has been in the form of a plea of guilty. Two courts of appeals, however, have rejected this approach altogether and have required the demonstration of no reliance at all, such that, had Petitioner's case arisen in one of those circuits, he would have been entitled to the §212(c) waiver.

This case presents the following question of law:

When the Petitioner exercised his right to trial in a criminal case in 1995, and for which he was convicted and sentenced to 24 months probation, whether his exercise of his right to trial – or his failure to otherwise demonstrate any prior purported reliance upon receiving relief under §212(c) – should make him ineligible for a §212(c) waiver, under which a fair reading of this Court's precedent concerning the improper reach of retroactive statutes, he should have been entitled, regardless of whether he exercised his right to trial or entered a plea of guilty?

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Opinion Below

The opinion of the court of appeals (App. 1 – 8, *infra*) is unreported, but available at Westlaw, 2007 WL 2030599.

Jurisdiction

The judgment of the court of appeals was entered on July 16, 2007. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Statutes and Regulations Involved

Sixth Amendment to the U.S. Constitution; 8 U.S.C. §1182(c), INA §212(c) (West, 1996); 8 U.S.C. §1231(a)(5), INA §241(a)(5), (West, 2006); and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Section 304(b), which are reproduced in the Appendix (App. 9 – 10).

Statement of the Case

The facts relevant to Petitioner's appeal were never in dispute. The Petitioner, Francisco Zamora, a legal permanent resident since 1985, was placed into immigration proceedings in 2001, as a result of being denied readmission into the United States after a vacation to Mexico for prior Illinois convictions of possessing a stolen vehicle in 1990 and cocaine possession in 1995. At his immigration hearing in 2005, the Petitioner requested a waiver of inadmissibility under 8 U.S.C. §1182(c), INA §212(c) (1994) (repealed), arguing that its repeal under Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), (eff. April 1,

1997), should not be applied retroactively. The immigration court held that, consistent with its reading of *I.N.S. v. St. Cyr*, 121 S.Ct. 2271 (2001), the Petitioner was ineligible for a waiver under §212(c) of the 1995 possession of cocaine offense because he did not plea guilty to it, but was found guilty after trial.

The Petitioner filed a timely Petition for Review at the Seventh Circuit Court of Appeals under 8 U.S.C. §1252. The Petitioner conceded that he was ineligible for cancellation of removal under §240A of IIRIRA, not because he committed an aggravated felony, but because his 1990 offense occurred within 7 years of his admission as a legal permanent resident in 1985, thus breaking the required "continuous residence" period. 8 U.S.C. §1229b(a)(2), (d)(1), (West, 2004) ("any period of continuous residence . . . shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) . . . .") The Petitioner's only avenue for relief was under the repealed §212(c).

Although the case obviously never reached the merits under §212(c), it did not go unnoticed by the Seventh Circuit that the Petitioner's case presented favorable discretionary factors. The Petitioner was not disqualified for relief under §240A for commission of an "aggravated" felony under 8 U.S.C. §1101(a)(43). 8 U.S.C. §1229b(a)(3) (West, 2004). Further, the Petitioner was never incarcerated for either of his offenses, but was placed on probation for each offense. Decision, (App.) Further, other favorable factors with respect to the Petitioner were that he was 42 years old, has two United States citizen children, aged 23 and 8 years old, plus two grandchildren, and has worked at the Advance Wheel Corporation since 1989, and serves as an usher in his

church. It cannot be said, therefore, that he would not be without some chance of prevailing upon a §212(c) waiver if he were, indeed, deemed eligible for one. The court of appeals, however, held that IIRIRA was not impermissibly retroactive as to the Petitioner because he failed to plea guilty to his 1995 cocaine possession offense, saying "[w]e have since foreclosed the possibility of §212(c) relief for an alien who did *not* plead guilty to an aggravated felony prior to IIRIRA, reasoning that he 'did not abandon any rights or admit guilt in reliance on continued eligibility for §212(c) relief." Decision, (App. 5) (emphasis in original) (*quoting, Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir. 2004)).

The Petitioner argued that this reading of this Court's decision in *St. Cyr* was too restrictive, especially in light of this Court's decisions in other factual contexts in which retroactivity was in issue. With respect to the issue of whether the particular alien in *St. Cyr* had a "reliance interest," the Court discussed the likelihood of a *quid pro quo* in obtaining a plea, *id.*, at 321, S.Ct. at 2291, and in light of the benefit that prosecutors obtained from the plea, it would be contrary to "'familiar considerations of fair notice, reasonable reliance, and settled expectations' to hold that IIRIRA's subsequent restrictions deprive them of any possibility of that relief [under §212(c)]." *Id.*, at 323-24, S.Ct. at 2292 (*quoting, Landgraf*, at 511 U.S., at 270, 114 S.Ct. 1483). But, under the facts of the case presented in *St. Cyr*, the Court made it clear that other circumstances may exist in which a party may claim illegal retroactive effect of IIRIRA, even without a plea of guilty, when it said that "[b]ecause respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to trial,

the elimination of any possibility of §212(c) relief by IIRIRA has an *obvious and severe retroactive effect*." *Id.*, at 325, S.Ct. at 2293 (emphasis added). By saying that applying the new law would have an "obvious and severe retroactive effect" indicates, quite clearly, that in the spectrum of retroactivity cases which could be litigated, that *St. Cyr* presents a more serious one, while less serious ones may also demonstrate an improper retroactive effect of the applicability of IIRIRA. As demonstrated below, two courts of appeals would have accepted the Petitioner's argument.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Ruling Conflicts With Decisions of Other Courts of Appeal on an Important, But Unsettled, Federal Question.

A. The Petition Presents an Important Federal Question.

The Petition presents an important federal question because there is a clear conflict among the circuits concerning whether an alien must demonstrate reliance upon a prior law in order to be entitled to its benefit. A majority of the courts of appeals have required reliance upon prior law, whether presumed in the form of a plea of guilty or otherwise, which has undermined the fundamental principles set forth in *Landgraf* and other Court precedent concerning the retroactivity of new statutes.

This case also presents an important federal question because resolution of this case in Petitioner's favor will have an ameliorative affect upon aliens for many years. According to the Annual Report for the Department of Homeland Security, November 2006, "Immigration

Enforcement Actions: 2005," DHS removed 89,406 criminal aliens from the United States for the fiscal year 2005. It would be a conservative estimate to say that 2 – 3 percent of those claims involved persons who could have received §212(c) relief if it were not for receiving convictions as a result of exercising their right to trial before April 1, 1997.[1] At 2 percent, that would have been 1,788 cases for only 2005. Given the government's recent efforts to discover and remove criminal aliens, especially by improving computer recognition technology for the United States Customs and Border Protection ("USCBP") at the airports, and by authorizing local enforcement agencies to issue notice to appear to aliens, such as Waukegan Police Department in the State of Illinois, it may be anticipated that the government will continue to uncover persons with criminal convictions at an even greater rate for the next few years. And it may be anticipated that even if a small percentage of them are for offenses that pre-date IIRIRA, it will still be a substantial number of persons whose lives will be serious disrupted, or even destroyed, in the process. It is important to note, moreover, that an alien's eligibility for a waiver under §212(c) does not mean that he or she is entitled to it – for those aliens whose crimes were too

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[1] This Court, in *St. Cyr*, cited a Bureau of Justice Statistics report which stated that 90% of all criminal convictions were obtained by plea agreements. *Id.* at 323, n. 51. It would mean, conversely, that 10% are resolved after a trial. It is not unreasonable to conclude that a mere 2 – 3% of the 10% figure would be for convictions which were received prior to April 1, 1997, in light of the government's recent investigation and enforcement efforts.

serious, or for those who the Attorney General finds has not been sufficiently rehabilitated since their last offense, the Attorney General is authorized to deny the waiver with broad and unreviewable discretion.

B. The Courts of Appeals Are Clearly Divided on the Applicability of this Court's Retroactivity Analysis in *I.N.S. v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001).

In *St. Cyr*, the Court relied upon a considerable history of Court precedent concerning the applicability of retroactive statutes, the most prominent of which were this Court's decisions in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and *Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998 (1997). Relying upon this precedent, the Court in *St. Cyr* formulated the rule to be applied as follows:

> The inquiry into whether a statute operates retroactively demands a commmonsense, functional judgement about 'whether the new provision attaches new legal consequences to events comlpteted before its enactment.'" *Martin*, 527 U.S., at 357-358, 119 S.Ct. 1998 (quoting *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483). A statute has a retroactive effect when it " 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .'" *Id.*, at 269, 114 S.Ct. 1522 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767, No. 13,156 (C.C.D.N.H. 1814) (Story, J.)). As we have repeated counseled, the judgment whether

> a particular statute acts retroactively "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin*, 527 U.S., at 358, 119 S.Ct. 1998 (quoting *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483).

St. Cyr, at 321, 121 S.Ct. 2271.

Based upon this reading of the law, this Court made certain findings; in particular, that "people who entered into plea agreements with the expectation that they would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past.'" *Id.* at 321, S.Ct. 2291 (*quoting, Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). Further, this Court pointed out that "[p]lea agreements involve a *quid pro quo* between a criminal defendant and the government," *id.*, which involves exchanging "their constitutional rights (including the right to trial) and grant the government numerous 'tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources'" *Id.* at 322, 121 S.Ct. 2271, *quoting, Newton v. Rumery*, 480 U.S. 386, 393 n.3, 107 S.Ct. 1187, 94 L.Ed.2d 405 (1987). Lastly, the Court found that "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* The Court concluded these findings by saying that

> Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving §212(c) relief. Because respondent, and other aliens like him, almost certainly relied upon that

> likelihood in deciding whether to forgo their right to trial, the elimination of any possibility of §212(c) relief by IIRIRA has an obvious and severe retroactive effect.

St. Cyr, at 325, 121 S.Ct. 2271 (emphasis added).

Subsequent to *St. Cyr*, a majority of courts of appeals applied the facts of *St. Cyr* literally, *i.e.*, by refusing to permit §212(c) relief to any aliens except those who, prior to IIRIRA, entered pleas of guilty to their offenses. *See, Dias v. I.N.S.*, 311 F.3d 456 (1st Cir. 2002), *Rankine v. Reno*, 319 F.3d 93 (2nd Cir. 2003), *Hernandez-Castillo v. Moore*, 436 F.3d 516 (5th Cir. 2006), *Patel v. Ashcroft*, 401 F.3d 400 (6th Cir. 2005), *Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004), *LaGuerre v. Reno*, 164 F.3d 1035, (7th Cir. 1999), *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002), *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006), *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002), *Alexandre v. U.S. Att'y. Gen.*, 452 F.3d 1204 (11th Cir. 2006).

Other courts of appeals have rejected this narrow approach, not limiting its retroactivity analysis merely to *St. Cyr*, but also relying upon this Court's decisions in *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994) and *Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998 (1997). *Atkinson v. Attorney General of the United States*, 479 F.3d 222 (3rd Cir. 2007), *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004). In *Atkinson*, the court held that,

> IIRIRA attached a new legal consequence to Atkinson's conviction: the certainty – rather than the possibility – of deportation. Such a change in legal consequences based on events

> completed before IIRIRA's enactment constitutes an impermissible retroactive effect.
>
> We emphasize that the important "event" to which IIRIRA attached a new legal consequence was the conviction. The fact that Atkinson was not offered a plea and did not engage in a *quid pro quo* exchange is not the event which triggered his inability to seek relief. Applying IIRIRA's repeal of 212(c) retroactively affected aliens because of the *conviction* for an aggravated felony. This is clear because, regardless of whether the conviction resulted from trial or plea, IIRIRA's repeal of section 212(c) had the same impact – the repeal did not attach any different legal consequences to a conviction based on a bargained plea than it did to a conviction following trial.

Atkinson, at 230 (citations omitted) (emphasis in original). In *Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004), the court said:

> we believe reliance, in any form, is irrelevant to the retroactivity inquiry. To the extent that it could or should be understood as required in order to establish impermissible retroactive effect however, we would insist at most upon objectively reasonable reliance (as opposed to the subjective reliance proposed b the government and dissent). This said, we must admit that it is unclear to us in what circumstance, if any, "reasonable reliance" inquiry will (or at least should) yield a conclusion different from that reached by Justice Story's framework.

Id. at 396 (citations omitted). Accordingly, the court held that "IIRIRA is impermissibly retroactive because it indisputably attached new legal consequences to [the alien's] decision to plead guilty." *Id.*

II. The Court of Appeals Decided an Important Federal Matter That Has Not Been, But Should Be, Settled by This Court.

In Petitioner's case, the court of appeals held that

> We have since foreclosed the possibility of §212(c) relief for an alien who did *not* plead guilty to an aggravated felony prior to IIRIRA, reasoning that the "did not abandon any rights or admit guilt in reliance on continued eligibility for §212(c) relief."
>
> * * *
>
> Zamora argues that the only relevant question is whether IIRIRA impaired the rights he possessed at the time of his conviction or increased his liability for past convictions. But under that formulation *all* aliens convicted of crimes prior to IIRIRA who otherwise would have been eligible for §212(c) relief would remain eligible, regardless of how their convictions were obtained. Thus, Zamora's retroactivity test would render moot virtually all of the Supreme Court's analysis in *St. Cyr* and require us to overturn *Montenegro*. Zamora has not persuaded us to do so, nor has he argued for an exception to *Montenegro* that would be consistent with our precedent.

Decision, App. 5, 7 (emphasis in original). The court of appeals in Petitioner's case is consistent with the majority insofar as it denied relief absent a plea of guilty to his offense.

A. The Majority of the Courts of Appeals Have Misinterpreted this Court's Precedent

A majority of the courts of appeals have required reliance in light the Court's language in both *St. Cyr* and *Landgraf* that courts should be informed by "familiar considerations of fair notice, ***reasonable reliance***, and settled expectations." *St. Cyr*, 533 U.S., at 321, 121 S.Ct. 2271, *Landgraf*, 511 U.S., at 270 (emphasis added). This emphasis on reliance, however, is misplaced. The language above, found in *Landgraf*, concludes with the words "offer sound guidance," meaning that these considerations should offer guidance. *Landgraf*, 511 U.S., at 270, 114 S.Ct. 1483. This means that these considerations are secondary to the main principle that a statute has a retroactive effect when it " 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .'" *St. Cyr*, at 321, 121 S.Ct. 2271 (*quoting, Society for Propagation of the Gospel v. Wheeler*, 22 F.Cas. 756, 767, No. 13,156 (C.C.D.N.H.) (Story, J.). Furthermore, there is nothing in this Court's precedent which indicates that reliance upon prior law should be a condition precedent to finding that a statute is impermissibly retroactive. *See, Atkinson, Olatunji, supra.*

In *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994), the plaintiff filed a complaint for sexual harassment including a count for constructive discharge

under Title VII. *Id.*, at 248, 114 S.Ct. at 1488. After a bench trial the district court found that the plaintiff had been sexually harassed, but dismissed the plaintiff's claim of constructive discharge. *Id.* While the petitioner's case was pending on appeal, the Civil Rights Act went into effect, which created a new right to a jury trial on damages, as well as wholly new compensatory and punitive damage provisions which would have attached to her constructive discharge claim under Title VII. *Id.*, at 249, 114 S.Ct. at 1489 – 90. After holding that the punitive provision could not possibly be retroactive, the Court said with respect to the new compensatory damage provision that it "resembles a statute increasing the amount of damages available under a preestablished cause of action [that] would . . . undoubtedly impose on employers found liable 'new disability' in respect to past events." *Landgraf*, at 283, 114 S.Ct. at 1506 – 07. The Court held that the new compensatory damage provision would not only "impact private planning," but would also "attach an important new legal burden to that [prior] conduct" to the Title VII defendants. *Id.* at 283, 282, 114 S.Ct. at 1483. That was apparently enough legal basis for the Court to reject retroactive application of the amendments allowing compensatory damages under Title VII. There was no mention of reliance on a prior law in order to find that the new statute in that case was impermissibly retroactive.

In *Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998 (1997) the Court was presented with new legislation, Prison Litigation Reform Act of 1995 ("PLRA"), which reduced the pay rate for attorneys who had previously prevailed in prisoner litigation and were currently engaged in post-judgment monitoring and, thus, had on-going bills

submitted to the state on a semi-annual basis. *Id.*, at 346, S.Ct. at 2001. The PLRA was passed in the midst of semi-annual award to the attorneys. The state argued that the reduced pay applied retroactively to all services contained in the latest bill, even if rendered prior to the enactment of PLRA. The attorneys argued that the PLRA did not apply at all because the cases upon which they were based were filed prior to the enactment of PLRA. The Court held that the new rates would not apply retroactively to services rendered before the Act's passage, but that neither would the attorneys be able to avoid the reduced rate after the Act's passage.

In holding that the fee provision should not be applied retroactively, the Court in *Martin* said that the attorneys "had a reasonable expectation" that they would be compensated under the old rule and, further, that "they worked in reasonable reliance on this fee schedule." *Id.*, at 358, S.Ct. at 2006. While the Court did, in this instance, mention that the unfairness of retroactivity would affect the expectation of the parties involved, the Court did not lose sight of the general principles involved when it said that "[t]o give effect to the PLRA's fees limitations, after the fact, would 'attach new legal consequences' to completed conduct." *Id.* (*citing*, *Landgraf*, at 270, 114 S.Ct. 1483). The Court in *Martin* did not in any way limit the scope of its retroactivity analysis in *Landgraf* to merely reliance, although the consideration was clearly important to its deliberations.

In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871 (1997), the Court said that retroactive application of an 1986 amendment, which eliminated certain defenses to *qui tam* suits and, consequently, could revive the government's claims,

would have the effect of impermissibly subjecting the petitioner to previously foreclosed *qui tam* litigation. *Id.*, at 950, 117 S.Ct. at 1871. The Court's argument supporting this conclusion relied upon the principle that it was similar to extending a statute of limitations which would impermissibly "alter the substantive rights of a party and increase a party's liability." *Id.* There is no mention of reliance at all.

In *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240 (2004) the Court held that the Foreign Sovereign Immunities Act of 1976 did not provide a basis for petitioners to recover paintings held by the Austrian government which were originally taken by the Nazis. That holding was based upon Congress' clear intent that the claims under the Act should only be covered by the Act "henceforth." *Id.*, at 697, S.Ct. at 2252. The Court held that its decision in *Landgraf* was informative, referring to the presumption against retroactivity. *Id.*, at 696, S.Ct. at 2252. The Act overcame that presumption with the clarity with which Congress intended that it apply to past conduct. In its discussion on this presumption, the Court said, in reference to a private parties interest in litigation, that "[t]he aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct." *Id.* This reference to reliance, however, was not central to the Court's analysis and, further, the Court did not disregard the other aspects of *Landgraf*'s default rule that "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with

respect to transactions already completed." *Id.*, at 694, S.Ct. at 2250 – 51.

In *Fernandez-Vargas v. Gonzales*, ___ U.S. ___, 121 S.Ct. 2422 (2006), the Court dealt again with an assertion of retroactivity under the INA. The new statute, §241(a)(5), stripped aliens of a right to a hearing if the alien illegally returned to the U.S. after an order of deportation was entered. *Id.*, at ___, 121 S.Ct. at 2425:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. §1231(a)(5), INA §241(a)(5), (West, 2006). But prior to the enactment of IIRIRA in 1996, the previously applicable provision, §241(f), only reinstated the order of removal in cases where the person wilfully avoided deportation and was convicted of it. 8 U.S.C. §1252(f), INA §241(f), (West 1995). All others could have been placed in removal proceedings again and could reassert any defenses they may have had. *See, Fernandez-Vargas*, at __, 121 S.Ct. at 2426. In *Fernandez-Vargas*, the petitioner had illegally reentered the U.S. before IIRIRA's effective date of April 1, 1997, and asserted that the new provision should not be applied to him.

The Court decided the question without reaching the second prong of the *Landgraf* analysis, because,

according to the Court, "[c]ommon principles of statutory interpretation fail to unsettle the apparent application of §241(a)(5) to any reentrant present in the country, whatever the date of return." *Id.* at ___, 121 S.Ct. at 2430. In light of the language of the new provision, *i.e.*, that it would apply "under the prior order at any time of reentry," the Court held that it was the choice the non-citizen made to remain in the country illegally which "subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." *Id.* at ___, 121 S.Ct. at 2432. The Court discussed the fact that the respondent in *St. Cyr* had presumably relied upon the prior law by his plea of guilty, but only to contrast it with the petitioner's case in *Fernandez-Vargas*, saying that the illegal reentry itself is not punished in the provision, but the non-citizen's continued presence made the statute applicable, not some past criminal act, as was the case in *St. Cyr*. *Fernandez-Vargas*, at ___, 121 S.Ct. at 2432.

As this Court's precedent decisions demonstrate, the courts of appeals in the majority have misinterpreted the import of this Court's decision in *St. Cyr*. Indeed, three courts of appeals have required "actual" reliance prior to finding that the new law would be impermissibly retroactive, if there was no plea of guilty entered. Courts will frequently make presumptions of law because they are necessary to the efficient administration of the law, disposing of time-consuming evidentiary hearings. Certainly, the Court in *St. Cyr* created a presumption when it held that an alien who plead guilty would be presumed to have relied on prior law. If the majority of the courts of appeals are correct in their reading of *St. Cyr*, however, it would not be inconsistent to draw the conclusion that *St. Cyr* imposes a requirement that the

alien demonstrate "actual" or subjective reliance, either by way of a plea of guilty – the easiest way – or some other way.[2]

Two courts of appeals have recently taken the reliance interest requirement in this direction by requiring that aliens demonstrate actual "individualized" reliance on the prior law. *Carranza-de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007), *Wilson v. Gonzales*, 471 F.3d 111 (2nd Cir. 2006), *Restrepo v. Gonzales*, 369 F.3d 627 (2nd Cir. 2004). In *Wilson* the court held that if "the record demonstrates that Wilson reasonably relied on the continued availability of §212(c) relief and, based on that reasonable reliance, intentionally forwent filing an application for §212(c) relief until a later date in the hopes of presenting a stronger application," then he would be entitled to relief if he makes "an individualized showing of reliance." *Id.* The court of appeals made this decision in light of its previous decision in *Restrepo v.*

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[2] Some courts of appeals have analyzed, at length, whether *St. Cyr* requires objective reliance or subjective reliance; this inquiry, however, does not make much sense because presumptions of law generally obviate the need for evidence and *St. Cyr* clearly never proposed that a certain type of evidence is required. *See, Hernandez de Anderson v. Gonzales*, __ F.3d __, 2007 WL 2264698 (9th Cir. 2007). In *St. Cyr* the Court said that the plea of guilty was sufficient evidence of reliance. But if some evidence is always required, as the majority of courts of appeals have proposed, it necessarily follows without question that once a court commands the production of some kind of evidence, it must be relative to that particular person, and it will be, naturally, actual and/or subjective. And a court thereafter may judge the degree to which it will consider the evidence sufficient with respect to the presumptions or inferences that flow from it, but it will always be actual and/or subjective.

Gonzales, 369 F.3d 627 (2nd Cir. 2004), where the court held that

> We deem it wise to let the district court decide, in the first instance, whether an alien such as Petitioner must make an individualized showing that he decided to forgo an opportunity to file for a 212(c) relief in reliance on his ability to file at a later date (and, if he must, whether Petitioner can do so), or whether, instead, a categorical presumption of reliance by any alien who might have applied for 212(c) relief when it was available, but did not do so, is more appropriate.

Id. at 639. *See, also, Carranza-de Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007) (case remanded where petitioner claimed that she withheld filing for a §212(c) waiver on the basis that she was attempting to create stronger record of rehabilitation), *Hernandez de Anderson v. Gonzales*, – F.3d –, 2007 WL2264698 (9th Cir. 2007) (reasonable reliance demonstrated by the filing of a naturalization application in 1995, prior to the effective date of IIRIRA, with respect to offense pre-dating IIRIRA.)

B. Requiring "Actual" Reliance Will Render Absurd Results and Place An Additional Unnecessary Burden Upon the Courts.

Requiring actual reliance will render absurd results and place an additional burden on the courts, which the changes brought by Congress by IIRIRA clearly sought to avoid. For example, the court in *Restrepo* declined to consider the Government's argument that waiting to file it is not a decision compelled by reliance, but by necessity. *See, Restrepo*, 638, n.19. As acknowledged by the court

there, a §212(c) application may be filed "prior to, at the time of, or at any time after the applicant's arrival into the United States." *Id.* It can hardly be expected, however, that any alien would file a waiver application without first being placed into proceedings. Thus, any assertion that an alien waited until proceedings is wholly fiction. It is akin to a person who committed a criminal offense turning himself in – although it is known to happen – in light of human nature, it is very unlikely.

C. Requiring a Plea of Guilty Undermines the Right to Trial under the Sixth Amendment.

Further, requiring reliance by way of a plea of guilty infers that exercising one's right to trial is not inviolable. A criminal defendant, under the Sixth Amendment of the United States Constitution, is entitled to "the right to a speedy and public trial, by an impartial jury . . . ." If the majority is correct, requiring reliance, usually in the form of a plea of guilty to the offense, simply sends the wrong message about exercising one's right to trial against criminal charges. In *Duncan v. State of Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), the Court said with respect to this right that

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government . . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Duncan, at 156, 88 S.Ct. 1444. And, where the courts of appeals are insisting that an alien plea guilty in order to be entitled to a benefit under prior law will carry the inference that it also applies to the future conduct.

D. The Real Focus is Congress' Intent, not the Intent of the Parties

Besides casting doubt on the right to a jury trial, requiring reliance also disturbs the focus concerning the retroactivity analysis as a whole. In *Olatunji*, the court of appeals articulated the problem as follows:

> Justice Story's formulation, which the Supreme Court has consistently relied upon, asks only whether a statute *in fact* has a retroactive effect, and we would ask no more. If the presumption is that Congress does not intend statutes to operate retroactively (and that is the presumption we indulge), then it follows that if a statute does *in fact* impose new legal consequences on past actions, Congress did not intend such. Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent – the very basis for the presumption against statutory retroactivity. . . . [I]t is an another altogether [presumption] to indulge the quite different, and unsupported and unsupportable, presumption that Congress so intends, but only where the particular petitioning party can prove that he subjectively relied on the prior statute to his detriment.

Olatunji, at 394 (emphasis in original). The focus should be upon Congress' intent in drafting the statute not the

party seeking to avoid the retroactive application of a new statute. The court accurately pointed out that it is unsupportable to shift the burden to a party's intent when the intent of Congress is the real focus.

In sum, *St. Cyr* should not be construed to uphold reliance as a condition precedent on equal par with the proposition that a statute is impermissibly retroactive which "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed . . . ." *Landgraf.*, at 280, 114 S.Ct. 1483. In *St. Cyr* the Court merely decided the case before it and stated that where the alien plead guilty to his offense, it demonstrated a "severe and obvious retroactive effect" to apply the new law. *St. Cyr* should not be read to preclude the application of this Court's precedent in Petitioner's case, namely, that IIRIRA either "impair[ed] [his] rights [when he] acted," and/or "increase[d] [his] liability for past conduct." *Landgraf.*, at 280, 114 S.Ct. 1483.

III. Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

James C. Ten Broeck Jr.
Counsel for Petitioner

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued April 17, 2007
Decided July 16, 2007

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 06-2742
FRANCISCO C. ZAMORA
Petitioner,
v.

ALBERTO R. GONZALES, Attorney
General of the United States,
Respondent.

O R D E R

Francisco Zamora, a permanent resident since 1985, took a brief trip to his native Mexico in 2001 and was denied readmission based on his prior Illinois convictions for possessing a stolen car in 1990 and possessing cocaine in 1995. At his removal hearing, Zamora requested a waiver of inadmissability based on former INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed), arguing that its repeal should not apply retroactively. Relying on *INS v. St. Cyr*, 533 U.S. 289 (2001), in which the Supreme Court held that an alien who pleaded guilty to an aggravated felony prior to the repeal of § 212(c) remains eligible for discretionary relief, the IJ denied Zamora's request because he had not pleaded guilty to the cocaine charge. The BIA affirmed. Zamora now petitions for review, arguing that it would be impermissibly retroactive to apply the repeal of § 212(c) to him, regardless of whether he actually relied on the prior law. We deny the petition for review.

Zamora was admitted as a lawful permanent resident in 1985. He has two United States citizen children, aged 23 and 8, and two grandchildren. He has been employed as a machinist at Advance Wheel Corporation in Chicago since 1989, and he serves as an usher for his church. Unfortunately, Zamora also has two criminal convictions: in 1990 he pleaded guilty to possessing a stolen car, see 95.5 Ill. Comp. Stat. Ann. 4-103-A(1) (West 1990), and was sentenced to 24 months' probation; and in 1995 he unsuccessfully contested a charge of possessing less than 15 grams of cocaine, see 720 Ill. Comp. Stat. Ann. 570/402(c) (West 1994); he was again sentenced to 24 months' probation.

At his removal hearing, which was delayed until 2005, the IJ found him removable based on his convictions for a crime of moral turpitude (possessing a stolen car), see 8 U.S.C. § 1182(a)(2)(A)(i)(I), and a controlled substance

offense (possessing cocaine), *see id.* § 1182(a)(2)(A)(i)(II). Zamora argued that he should remain eligible for a discretionary waiver under former INA § 212(c) because his convictions predated the repeal of that statute. The IJ disagreed, saying that Zamora could not demonstrate that the elimination of § 212(c) relief is impermissibly retroactive because he pleaded not guilty and went to trial on the cocaine possession charge. Zamora appealed to the BIA, contesting, among other things, his ineligibility for a § 212(c) waiver. The BIA affirmed, explaining that under this and other circuits' precedent, Zamora's plea of not guilty precludes him from establishing impermissible retroactivity. Zamora timely filed this petition for review.

Zamora now argues that St. Cyr does not require him to demonstrate his reliance on INA § 212(c) to show that applying the repeal to him is impermissibly retroactive. He says that the appropriate test for impermissible retroactivity, established in *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), is whether the repeal "would impair rights [he] possessed when he acted" or "increase [his] liability for past conduct."

We review de novo an alien's claim of impermissible retroactivity. *See Valere v. Gonzales*, 473 F.3d 757, 761 (7th Cir. 2007). Determining retroactivity is a matter of statutory interpretation, and "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." *St. Cyr.*, 533 U.S. at 315-16 (citation and quotation marks omitted); *see Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2428 (2006). Where Congress's intent is ambiguous, we ask whether applying the new law would produce an impermissible retroactive effect. *St. Cyr*, 533 U.S. at 320. That inquiry "demands a commonsense, functional

judgment about whether the new provision attaches new legal consequences to events completed before its enactment," and "should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* at 321 (citations and quotation marks omitted).

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), the Attorney General possessed the authority under § 212(c) of the Immigration and Nationality Act to grant discretionary waivers of deportation to aliens who met certain criteria. AEDPA placed new limits on this authority in 1996, and in 1997 IIRIRA repealed § 212(c) altogether, replacing it with a similar form of relief called "cancellation of removal." *See* 8 U.S.C. § 1229b(a). Unlike § 212(c), however, the new provision makes aliens convicted of an aggravated felony ineligible for relief. See id. (Zamora notes, and the government does not dispute, that neither of his offenses are aggravated felonies. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006) (simple possession of a controlled substance is not an aggravated felony); 8 U.S.C. § 1101(a)(43)(G) (theft offense for which prison sentence is less than one year is not an aggravated felony).) The new law also requires an alien to have "resided in the United States continuously for 7 years after having been admitted in any status," *see* 8 U.S.C. § 1229b(a), and an alien's commission of a crime of moral turpitude ends that continuous residence. *See* 8 U.S.C. § 1229b(d). (We note that cancellation of removal does not appear to be an option for Zamora. According to his attorney, he is ineligible for cancellation of removal because he committed a crime of moral turpitude less than seven years after his admission (he possessed a stolen car in 1990). Thus, he cannot meet the new

continuous residence requirement. *See* 8 U.S.C. § 1229b(d). In any event, Zamora did not apply for cancellation of removal.)

In *St. Cyr*, the Supreme Court held that Congress did not unambiguously intend IIRIRA's repeal of § 212(c) to apply retroactively. *See* 533 U.S. at 320. The Court then analyzed whether the repeal of § 212(c) is impermissibly retroactive when applied to aliens, like St. Cyr, who pleaded guilty to an aggravated felony prior to the repeal. *See id.* The Court concluded that because people who pleaded guilty "almost certainly relied upon [the likelihood of receiving § 212(c) relief] in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." Id. at 325. The Court emphasized the *quid pro quo* involved in plea agreements, explaining that, because aliens like St. Cyr gave up their right to contest charges at trial and the government benefitted from their plea agreements, "it would surely be contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations, to hold that IIRIRA's subsequent restrictions deprive [them] of any possibility of such relief." *Id.* at 323-24 (citation and quotation marks omitted).

We have since foreclosed the possibility of § 212(c) relief for an alien who did not plead guilty to an aggravated felony prior to IIRIRA, reasoning that he "did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief." *Montenegro v. Ashcroft*, 355 F.3d 1035, 1036-37 (7th Cir. 2004) (per curiam) (*citing Lara-Ruiz v. INS*, 241 F.3d 934, 945 (7th Cir. 2001); *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)). And the vast majority of circuits similarly have rejected arguments for § 212(c) relief brought by aliens

who contested at trial the crimes that now render them ineligible for cancellation of removal. *See Hernandez-Castillo v. Moore*, 436 F.3d 516, 519-20 (5th Cir. 2006), *cert. denied*, 2006 U.S. LEXIS 5697 (Oct. 2, 2006); *United States v. Zuniga-Guerrero*, 460 F.3d 733, 737-39 (6th Cir. 2006), *cert. denied*, 2007 U.S. LEXIS 521 (Jan. 8, 2007); *Alexandre v. U.S. Attorney Gen.*, 452 F.3d 1204, 1207 (11th Cir. 2006) (per curiam); *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003); *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002) (per curiam), *cert. denied*, 2003 U.S. LEXIS 4615 (June 16, 2003); *Chambers v. Reno*, 307 F.3d 284, 293 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002).

Not all circuits, however, view the existence of a guilty plea as the *sina qua non* of a retroactivity claim after *St. Cyr*. For example, the Second Circuit has said that an alien can demonstrate reliance, notwithstanding his plea of not guilty, by showing that he delayed submitting a § 212(c) application to build a stronger case of rehabilitation from his criminal past. *See Restrepo v. McElroy*, 369 F.3d 627, 634-35 (2d Cir. 2004). The Third Circuit has held that aliens who go to trial may nevertheless "have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them," if they turned down a plea agreement. *See Ponnapula v. Ashcroft*, 373 F.3d 480, 494 (3d Cir. 2004). And the Tenth Circuit has held that the repeal of § 212(c) does not apply to aliens who contest an aggravated felony charge but forego their right to appeal. *See Hem v. Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006).

Zamora does not argue that any of those exceptions apply to him. Instead he argues—without addressing our contrary precedent—that we should either reject a

reliance requirement or simply presume that he relied upon the prior state of the law. But like virtually every circuit that has addressed a post-*St. Cyr* retroactivity claim, reliance plays a central role in our retroactivity analysis. *See Montenegro*, 355 F.3d at 1037. In *Montenegro*, the alien had unsuccessfully contested the charge that he had possessed with the intent to deliver more than 900 grams of cocaine, an aggravated felony. *Id.* at 1036. *Citing Lara-Ruiz*, 241 F.3d at 945 (quoting *LaGuerre*, 164 F.3d at 1041), in which we explained that it would "border on the absurd" to argue that an alien "would contest criminal charges more vigorously if he knew that after he had been imprisoned and deported, a discretionary waiver of deportation would no longer be available to him," we refused to find impermissible retroactivity because Montenegro's plea of not guilty did not demonstrate reliance on his continued eligibility for § 212(c) relief. *Montenegro*, 355 F.3d at 1037. Even the Third and Tenth circuits, which Zamora cites because they reject the notion that actual reliance is required to show impermissible retroactivity, *see Ponnapula*, 373 F.3d at 491-94; Hem, 458 F.3d at 1196, analyzed whether it would have been objectively reasonable for the aliens in those cases to have relied on continued eligibility for § 212(c) relief, *see Ponnapula*, 373 F.3d at 494; *Hem*, 458 F.3d at 1197. Only the Fourth Circuit has wholly foresworn a reliance requirement, whether actual or objective. *See Olatunji v. Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004).

Zamora argues that the only relevant question is whether IIRIRA impaired the rights he possessed at the time of his conviction or increased his liability for past convictions. But under that formulation all aliens convicted of crimes prior to IIRIRA who otherwise would have been eligible for § 212(c) relief would remain

eligible, regardless of how their convictions were obtained. Thus, Zamora's retroactivity test would render moot virtually all of the Supreme Court's analysis in *St. Cyr* and require us to overturn *Montenegro*. Zamora has not persuaded us to do so, nor has he argued for an exception to *Montenegro* that would be consistent with our precedent.

Accordingly, we DENY the petition for review.

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8 U.S.C. §1182(c), INA §212(c) (West. 1996)

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent resident who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Sections 304(b) & 309(a).

DIVISION C—ILLEGAL IMMIGRATION REFORM AND IMMIGRANT

RESPONSIBILITY ACT OF 1996

* * *

TITLE III—INSPECTION, APPREHENSION, DETENTION, ADJUDICATION, AND REMOVAL OF

INADMISSIBLE AND DEPORTABLE ALIENS

Subtitle A—Revision of Procedures for Removal of Aliens

* * *

Sec. 304. Removal proceedings; cancellation of removal and adjustment of status; voluntary departure (revised and new sections 239 to 240C).

* * *

(b) REPEAL OF SECTION 212(c).—Section 212(c) (8 U.S.C. 1182(c)) is repealed.

* * *

Sec. 309. Effective Dates; Transition.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

No. 07-820

In the Supreme Court of the United States

FRANCISCO C. ZAMORA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

As a result of 1996 amendments, aliens convicted of certain offenses were made statutorily ineligible for a discretionary waiver of deportation under Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994). In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that it would be impermissibly retroactive to apply the 1996 amendments to an alien convicted of an aggravated felony on the basis of a plea agreement made at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The question presented is:

Whether, in light of *St. Cyr*, it is impermissibly retroactive to apply the 1996 repeal of Section 212(c) to an alien who was convicted of a disqualifying offense after a trial and who does not claim to have relied in any way on the potential availability of discretionary relief under Section 212(c).

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In the Supreme Court of the United States

No. 07-820

FRANCISCO C. ZAMORA, PETITIONER

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MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 240 Fed. Appx. 150. The amended order of the Board of Immigration Appeals (Pet. Supp. App. 1-5) and the oral decision of the immigration judge (App., *infra*, 1a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2007. The petition for a writ of certiorari was filed on October 15, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed

1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from being excluded from the country. By its terms, Section 212(c) "was literally applicable only to exclusion proceedings," but it was construed as applying to deportation proceedings as well. *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including aggravated felonies. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c) altogether, see Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a more-limited form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A makes ineligible for discretionary relief aliens who have been convicted of aggravated felonies. 8 U.S.C. 1229b(a)(3). It also requires an alien who is a lawful permanent resident seeking such discretionary relief to have "resided in the United States continuously for 7 years after having been admitted in any status," 8 U.S.C. 1229b(a)(2), and it cuts off that period of "continuous residence" whenever the alien commits, *inter alia*, a crime involving moral turpitude. 8 U.S.C. 1229b(d)(1)(B) (Supp. V 2005).

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of an agreement to

plead guilty that was made at a time when the resulting conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a native and citizen of Mexico who entered the United States as a lawful permanent resident of the United States in 1985. Pet. App. 2. In 1990, he pleaded guilty to, and was convicted of, possessing a stolen motor vehicle. Pet. App. 2; Pet. C.A. Br. 3. In 1995 he was convicted of possession of cocaine, after pleading not guilty and going to trial. Pet. App. 2-3. In November 2001, the Immigration and Naturalization Service (INS) commenced removal proceedings against him after he attempted to re-enter the United States after a trip to Mexico.[1] It alleged that petitioner was removable because the first offense was a crime involving moral turpitude and the second was a controlled-substance offense. *Ibid.* 2-3; App., *infra*, 2a; see 8 U.S.C. 1182(a)(2)(A)(i)(I) and (II).

At petitioner's removal hearing, the immigration judge (IJ) found petitioner removable on both of the charged grounds. App., *infra*, 3a. Petitioner sought discretionary relief from removal under Section 212(c).[2] The IJ ruled that Section 212(c) relief is unavailable to an alien convicted before the 1996 amendments if the alien was convicted at trial. Because petitioner did not plead guilty to the 1995 cocaine charge, the IJ found that his application for Section 212(c) relief was pretermitted and ordered him removed to Mexico. Pet. App. 2-3; App., *infra*, 3a.

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[1] The INS's immigration-enforcement functions have since been transferred to the Department of Homeland Security. See 6 U.S.C. 251 (Supp. V 2005).

[2] Petitioner did not apply for cancellation of removal under Section 240A. Pet. App. 5; Pet. 2.

Petitioner appealed to the Board of Immigration Appeals (BIA), contesting, *inter alia*, his ineligibility for Section 212(c) relief. The BIA issued a decision on May 16, 2006, and then issued amended decisions on May 24 and 25, 2006. Pet. Supp. App. 2, 5 n.1. The BIA determined that, because petitioner's controlled-substance conviction did not result from a guilty plea, petitioner is ineligible for Section 212(c) relief, and "there is nothing in [*St. Cyr*] which indicates that its reasoning applies to aliens who failed to enter a plea of guilty or nolo contendere." *Id.* at 4. In support of its conclusion, the BIA cited decisions from the Seventh Circuit and other courts of appeals. *Id.* at 4-5.

3. Petitioner then filed a petition for review of the BIA's decision with the United States Court of Appeals for the Seventh Circuit. Pet. App. 2. In the court of appeals, petitioner explained that, "[a]lthough it was never discussed in the proceedings below," he is "not eligible for relief under the current law of cancellation of removal at § 240A" because his 1990 conviction for an offense involving moral turpitude precludes him from establishing the seven years of continuous residence required for discretionary relief by 8 U.S.C. 1229b(a)(2). Pet. C.A. Br. 3-4; see also 8 U.S.C. 1229b(d)(1)(B) (Supp. V 2005) (terminating "period of continuous presence" upon alien's commission of certain offenses).[3]

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[3] Before the IJ and the BIA, the parties apparently assumed that the 1995 conviction for possession of cocaine was an "aggravated felony" that precluded cancellation of removal by virtue of 8 U.S.C. 1229b(a)(3). After petitioner filed his petition for review in the court of appeals, but before he filed his supporting brief, this Court held that a state conviction for mere possession of an amount of cocaine too small to distribute did not constitute an "aggravated felony" under the INA, see *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). Petitioner thus claimed in the court of appeals that he was not ineligible for Section 240A relief on the basis

Although petitioner claimed that his 1990 conviction bars him from receiving a discretionary grant of cancellation of removal under current law, his argument in the court of appeals—like his retroactivity argument before the IJ and the BIA—was necessarily focused on IIRIRA's retroactive effect in repealing former Section 212(c) *vis-à-vis* his 1995 conviction, which had followed a trial rather than a guilty plea. Pet. App. 3; Pet. C.A. Br. 7-10. Thus, petitioner argued that *St. Cyr* does not require him to demonstrate reliance on Section 212(c). Pet. App. 3.

4. The court of appeals denied the petition for review. Pet. App. 1-8. It rejected petitioner's argument that *St. Cyr* does not require any showing of reliance. It described this Court's analysis in *St. Cyr* as being based upon: (1) the retroactive effect that followed from the "'almost certain[]'" reliance by those pleading guilty upon the likelihood of receiving Section 212(c) relief in deciding to forgo their right to a trial; and (2) "the *quid pro quo* involved in plea agreements," whereby those pleading guilty gave up their right to a trial and the government benefitted. Pet. App. 5 (quoting *St. Cyr*, 533 U.S. at 325). The court also noted that its own precedent had already "foreclosed the possibility of § 212(c) relief for an alien who did not plead guilty to an aggravated felony prior to IIRIRA, reasoning that he 'did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief.'" *Ibid.* (quoting *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004)).

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of any aggravated felony, Pet. C.A. Br. 3 & n.1, and the government did not dispute that conclusion, Pet. App. 4.

The court of appeals observed that "the vast majority of [other] circuits" agreed with its view. Pet. App. 5-6. It did, however, note three courts that contemplate a showing of reliance from something other than a guilty plea in certain circumstances: *Restrepo* v. *McElroy*, 369 F.3d 627, 634-635 (2d Cir. 2004) (aliens can demonstrate reliance, despite pleading not guilty, by showing they delayed applying for Section 212(c) relief to "build a stronger case of rehabilitation"); *Ponnapula* v. *Ashcroft*, 373 F.3d 480, 494 (3d Cir. 2004) (aliens going to trial may show reliance if they turn down a plea agreement); and *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006) (because of "objectively reasonable reliance on prior law," the repeal of Section 212(c) does not apply to aliens who contest an aggravated felony charge but forgo their right to appeal). Pet. App. 6. After observing that petitioner did not argue that he could show any of those forms of reliance, the court stated that "[o]nly the Fourth Circuit" had accepted petitioner's view and "wholly foresworn a reliance requirement." *Id.* at 7 (citing *Olatunji* v. *Ashcroft*, 387 F.3d 383, 396 (4th Cir. 2004)). Finally, the court concluded that petitioner's formulation would allow "all aliens convicted of crimes prior to IIRIRA" to remain eligible for relief, and thus render moot "virtually all of [this Court's] analysis in *St. Cyr*." *Id.* at 7-8. Accordingly, it affirmed the BIA's denial of relief and denied the petition for review. *Id.* at 8.

ARGUMENT

Petitioner contends (at 11-18) that *INS* v. *St. Cyr*, 533 U.S. 289 (2001), has been misinterpreted by the majority of the courts of appeals and that it does not require any showing of reliance as the basis for a finding of impermissibly retroactive effect. His case, however,

does not squarely present that question, because the conviction that precludes him from seeking discretionary relief from removal after the 1996 repeal of Section 212(c)—*i.e.*, the discretionary relief of cancellation of removal under Section 240A, 8 U.S.C. 1229b, which replaced former Section 212(c)—is not his 1995 conviction for cocaine possession (which was not an aggravated felony, see note 3, *supra*), but rather his 1990 conviction for a crime involving moral turpitude (which petitioner conceded below prevents him from accruing the necessary period of continuous physical presence, see p. 4, *supra*). Because petitioner's submission in this Court is based on the asserted application of IIRIRA to his 1995 conviction, the petition should be denied on this ground alone.

Moreover, even assuming that petitioner's request for relief turns on the extent to which reliance matters to retroactivity analysis, the unpublished decision of the court of appeals correctly rejected petitioner's claims, and this Court has already denied petitions urging a similar extension of *St. Cyr* in at least four prior cases. See *Hernandez-Castillo* v. *Gonzales*, 127 S. Ct. 40 (2006); *Thom* v. *Gonzales*, 546 U.S. 828 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005). The application of Section 212(c) is of diminishing prospective significance.

1. The question presented turns on the interaction between this Court's decision about retroactivity in *St. Cyr* and petitioner's decision to "exercise[] his right to trial in a criminal case in 1995" by choosing not to "enter[] a plea of guilty." Pet. ii. But petitioner's 1995 conviction at trial for possessing cocaine is not what precludes him from being eligible for the discretionary relief from removal that he seeks. As petitioner concedes,

he is "ineligible for cancellation of removal" under current law (Section 240A(a) of the INA, 8 U.S.C. 1229b(a)), "because his *1990 offense* [for possessing a stolen car] * * * break[s] the" seven-year period of continuous residence necessary to be eligible for such relief. Pet. 2 (emphasis added); see also Pet. App. 4-5. Petitioner noted in the court of appeals that he pleaded guilty to the 1990 offense. Pet. C.A. Br. 3. Thus, notwithstanding the focus of the court of appeals, which followed the focus of the arguments in petitioner's petition for review of the BIA's decision, this case does not present the opportunity to address the decisions of a majority of the courts of appeals to "den[y] relief" under Section 212(c) "absent a plea of guilty." Pet. 11.

Moreover, the analysis necessary to determine IIRIRA's retroactive effect on petitioner's 1990 guilty plea would differ from that employed by the decisions that petitioner describes as disagreeing about the retroactive effect of the repeal of Section 212(c). That analysis would depend on whether the provision stopping the period of continuous residence upon the commission of certain crimes, 8 U.S.C. 1229b(d)(1)(B) (Supp. V 2005), known as the "stop-time rule," applies retroactively to petitioner's 1990 conviction. As the First Circuit explained at length in *Peralta* v. *Gonzales*, 441 F.3d 23, 26-28 (2006), the transitional provisions in Section 309(c)(5) of IIRIRA, 110 Stat. 3009-627, as amended by the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(a), 111 Stat. 2196, applied the stop-time rule to immigration proceedings that began "before, on, or after the date of enactment" of IIRIRA. *Peralta* thus held that "Congress has expressly mandated that [the stop-time rule] be applied retroactively" to crimes that occurred before 1996. 441 F.3d at 30; see

also *Okeke* v. *Gonzales*, 407 F.3d 585, 588 (3d Cir. 2005) (applying stop-time rule to conviction from 1983 without discussing retroactivity). The Fifth Circuit has expressly extended that analysis to immigration proceedings (like petitioner's) that "do not fall under [IIRIRA's] transitional rule" because they were "commenced after" IIRIRA became fully effective in 1997. *Heaven* v. *Gonzales*, 473 F.3d 167, 174-176 (2006); but see *Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190, 1201 (9th Cir. 2006) (holding that "the permanent stop-clock rule contained in part B of § 1229b(d)(1) is ambiguous * * * with respect to its retroactive application to a conviction obtained pursuant to a guilty plea").

As even this cursory overview shows, determining whether IIRIRA retroactively forbids petitioner from being eligible for discretionary relief from removal involves several considerations that were neither pressed nor passed upon in the court of appeals, because petitioner conceded below that his 1990 conviction rendered him ineligible for cancellation of removal and has instead focused on his 1995 conviction, which did *not* render him ineligible for cancellation of removal. The petition should be denied on this ground alone.

2. a. Even assuming that this case properly turns on the retroactive effect of the bare repeal of Section 212(c), the court of appeals' decision is correct. In *St. Cyr*, this Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." 533 U.S. at 321-322 (citation and internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the

years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

In asserting that the court of appeals misinterpreted *St. Cyr*, petitioner relies (at 11-16) on a series of retroactivity cases: *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), *Martin* v. *Hadix*, 527 U.S. 343 (1999), *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), and *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422 (2006). The last of those decisions, however, explicitly discussed *St. Cyr* and confirmed the importance of reliance in the Court's analysis. The Court stated that in *St. Cyr* "we emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 2431-2432 (internal quotation marks omitted). Distinguishing the situation of *Fernandez-Vargas* from that of *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 2432 n.10. Similarly, as petitioner himself concedes

(at 13-14), "the consideration [of reliance] was clearly important to [the Court's] deliberations" in *Martin*, and reliance was discussed in *Altmann*.

b. As petitioner acknowledges (at 11), the Seventh Circuit is not the only court of appeals that has declined to extend the holding of *St. Cyr* generally to aliens convicted at trial, precisely because of *St. Cyr*'s emphasis on the showing of reliance provided by a guilty plea. At least six others have done so as well.[4] See *Hem* v. *Maurer*, 458 F.3d 1185, 1189 (10th Cir. 2006); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 520 (5th Cir.), cert. denied, 127 S. Ct. 40 (2006); *Rankine* v. *Reno*, 319 F.3d 93, 102 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002);[5] *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S.

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[4] Petitioner identifies (at 8) *Patel* v. *Ashcroft*, 401 F.3d 400 (6th Cir. 2005), as a case "refusing to permit § 212(c) relief to any aliens except those who, prior to IIRIRA, entered pleas of guilty." But, after determining that Patel was an aggravated felon, the Sixth Circuit dismissed the case for lack of jurisdiction, and did not reach the Section 212(c) issue. See *id.* at 402, 407, 411.

[5] In *Chambers*, the Fourth Circuit affirmed the BIA's denial of eligibility for Section 212(c) relief to an alien convicted pre-IIRIRA of an aggravated felony after trial. 307 F.3d at 287, 293. The court held that his "reliance interests" were not the same as those of an alien like St. Cyr who had pleaded guilty. *Id.* at 290-292. The court further stated that "an alien's failure to demonstrate reliance on pre-IIRIRA law might not foreclose" a retroactivity claim. *Id.* at 293. It determined, however, that, "[e]ven if that is so," IIRIRA's repeal did not change the impact of his "decision to go to trial on his immigration status" and therefore did not have an improper retroactive effect on him. *Ibid.*

902 (2003) (citing *United States* v. *Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000)).[6]

3. In addition, the conflict among the circuits on the general question of whether reliance is necessary to show a retroactive effect is narrower than petitioner claims. Petitioner points (at 8-10) to two cases holding that reliance is not necessary to show a retroactive effect. But the Fourth Circuit's decision in *Olatunji*, although mentioned by the court below (Pet. App. 7), does not conflict with the decision below. The retroactivity issue in *Olatunji* involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, 387 F.3d at 396, rather than loss of access to Section 212(c) relief. In fact, *Olatunji* itself distinguished the Fourth Circuit's prior decision in *Chambers*, which did involve Section 212(c). See 387 F.3d at 392 (discussing *Chambers*, 307 F.3d at 293).

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[6] As the Seventh Circuit observed, some of the courts requiring reliance have found that it can be demonstrated by circumstances other than a guilty plea. Petitioner gives (at 17-18) further examples of such cases. See *Hernandez de Anderson* v. *Gonzales*, 497 F.3d 927, 942-944 (9th Cir. 2007) (retroactivity found where lawful permanent resident who applied for naturalization 18 months prior to IIRIRA reasonably relied on access to suspension relief); *Carranza-De Salinas* v. *Gonzales*, 477 F.3d 200, 210 (5th Cir. 2007) (if alien can demonstrate on remand that she "affirmatively decided to postpone" applying for Section 212(c) relief to increase the likelihood of getting it, she would establish a reasonable "reliance interest" sufficient to show improper retroactivity); *Wilson* v. *Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006) (same). After the petition for a writ of certiorari was filed, the Second Circuit further clarified its view, explaining that "an alien can never [hope to] make the showing of detrimental reliance that *Wilson* requires if he did not actually apply for § 212(c) relief before he became ineligible pursuant to the statute under which he seeks to have his eligibility evaluated." *Singh* v. *Mukasey*, No. 07-1688-ag, 2008 WL 658239, at *5 (Mar. 13, 2008).

Even after *Olatunji*, the Fourth Circuit has—directly contrary to petitioner's argument—continued to hold that "IIRIRA's repeal of § 212(c) did not produce an impermissibly retroactive effect as applied to an alien convicted after trial." *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (2007).

Nevertheless, the Third Circuit's decision in *Atkinson* v. *Attorney General*, 479 F.3d 222 (2007), does conflict with the decisions discussed above. *Atkinson* dealt with whether an alien who had not been offered a plea bargain (unlike the alien in the Third Circuit's prior decision in *Ponnapula*) and who had been convicted of an aggravated felony at a pre-IIRIRA trial was eligible for Section 212(c) relief. *Id.* at 229-230. The Third Circuit, holding that a showing of reliance was not required, stated that it was "not troubled by [its] *dictum* in *Ponnapula* casting doubt on whether an alien in Atkinson's situation could demonstrate a reasonable reliance interest necessary to demonstrate a retroactive effect." *Id.* at 231. The court found that IIRIRA attached new legal consequences to the alien's conviction and resulting sentence such that the BIA could not preclude Section 212(c) relief "because IIRIRA's repeal of that section cannot be applied retroactively." *Ibid.*

4. Quite aside from the fact that seven circuits have reached a result contrary to *Atkinson*, further review would not be warranted for two additional reasons—even if, contrary to our submission on point 1, *supra*, this case properly presented the issue. First, the question presented in the petition necessarily has diminishing prospective significance, because it affects only removal proceedings for aliens convicted at trials before IIRIRA was enacted in 1996.

Second, it would in any event be premature for this Court to decide whether *St. Cyr*'s holding applies to aliens convicted of an aggravated felony at trial. A final rule adopted by the Department of Justice to implement *St. Cyr* by amending certain provisions of Title 8 of the Code of Federal Regulations, see *Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997*, 69 Fed. Reg. 57,826 (2004), provides that the 1996 amendments to the INA barring Section 212(c) relief apply to aliens who were convicted at trial. In its response to comments received on its proposed rule, the Department noted cases holding that "an alien who is convicted after trial is not eligible for section 212(c) relief under *St. Cyr*," and then stated that it "has determined to retain the distinction between ineligible aliens who were convicted after criminal trials[] and those convicted through plea agreements." *Id.* at 57,828. That determination was reflected in the amended regulations, which took effect on October 28, 2004. See *id.* at 57,833-57,835; 8 C.F.R. 1212.3(h) (2007) ("Aliens are not eligible to apply for section 212(c) relief under the provisions of this paragraph with respect to convictions entered after trial."). Only a few courts have considered these regulations in deciding whether *St. Cyr*'s holding applies to aliens convicted at trial, see, *e.g.*, *Alexandre* v. *United States Att'y Gen.*, 452 F.3d 1204 (11th Cir. 2006), and *Atkinson* itself did not reflect consideration of them. Even if the issue might otherwise warrant review by this Court at some point, review would be premature until the effect of the regulations has been further considered by the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2008

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No.: A 38 884 655

IN THE MATTER OF: FRANCISCO ZAMORA

Filed: Apr. 5, 2005

IN REMOVAL PROCEEDINGS

ON BEHALF OF RESPONDENT: Royal F. Berg

ON BEHALF OF DHS: Joseph M. Yeung

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico, who applied for admission into the United States on July 24, 2001, at Chicago's O'Hare International Airport by presenting a resident alien card in his name. The respondent's inspection was deferred based upon some criminal matters reflected in his record.

[Specifically,] on December 27, 1990, the respondent had been convicted in the State of Illinois, Circuit Court of Cook County, for possession of a stolen motor vehicle and had been sentenced to 24 months probation. On August 14, 1994, the respondent had been convicted in

the State of Illinois, Circuit Court of Cook County, for possession of a controlled substance, and had been sentenced to 24 months probation. The respondent was deemed inadmissible and a Notice to Appear was issued against [him] dated November 15, 2001 (Exhibit 1) charging him with removability under Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, as an alien convicted of a crime involving moral turpitude, and under Section 212(a)(2)(A)(i)(II) of the Act, in that he is an alien who has been convicted of an offense constituting a controlled substance offense.

The respondent, through his attorney, denied all the allegations contained in the Notice to Appear, on March 21, 2003, and subsequently submitted a motion to this Court, which has been entered into the record as Exhibit 6, seeking among other things the suppression of certain documentation submitted by the Government, as well as termination and for this Court's recusal. Rather than issue a hasty oral decision, this Court prepared a lengthy written decision, which has been entered into the record as Exhibit 7, addressing in detail the respondent's motions, basically denying them and I incorporate herein, by reference, the written decision dated March 25, 2005, addressing each of the respondent's arguments.

The respondent, in Exhibit 7, was ordered to present to this Court any [application for] relief from removal that he might be eligible for, at his hearing scheduled on April 5, 2005. On said date, the respondent submitted to the Court an application for advance permission to return to unrelinquished domicile on Form I-191. This document has been entered into the record as Exhibit No. 8. However, this Court determines that the respondent is statutorily ineligible for a waiver under Section

212(c) of the Immigration and Nationality Act, in that the conviction record, found at Exhibit 3, shows that the respondent had pled not guilty on February 8, 1995, to possession of a controlled substance, and that the respondent then had been in fact convicted and sentenced to probation and other conditions on April 11, 1995.

The respondent has objected to the admission into the record of this conviction [record] from the Circuit Court of Cook County, Illinois, however, my decision admitting it into the record has been addressed in my [prior] written decision, which is found at Exhibit 7. Having found that the respondent did not plead guilty, he cannot avail himself of the Supreme Court decision in *St. Cyr v. INS*, citation omitted, [ruling] that someone who had pled guilty based on a belief that he might be eligible for a waiver under Section 212(c) of the Act might still be able to seek a waiver before the Immigration Courts to date. Having found that the respondent did not enter a plea of guilty but rather proceeded on a plea of not guilty, and allowed the [Criminal] Court to make its ultimate finding of guilty, he cannot seek 212(c) relief to date, under the Supreme Court's holding in *St. Cyr*.

Therefore, I must pretermit the respondent's application found at Exhibit 8, and there being no other avenue of relief available to the respondent I hereby order the respondent removed to Mexico on the charges contained in the Notice to Appear, and on the basis stated

above, as well as in my written decision, which has been incorporated herein.

/S/ JENNIE L. GIAMBASTIANI *
JENNIE L. GIAMBASTIANI
United States Immigration Judge

[* Pen and ink corrections made by Immigration Judge and relate to transcriber errors.]

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(2)

Supreme Court, U.S.
FILED
07-820 OCT 15 2007
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

Francisco C. Zamora

Petitioner,

v.

Peter D. Keisler, Acting Attorney General of the United States

Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

SUPPLEMENTAL APPENDIX

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U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A38 884 655 - Chicago
Date: May 25, 2006

In re: FRANCISCO C. ZAMORA
IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Royal F. Berg, Esquire

ON BEHALF OF DHS:
Christine Young
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)]-Crime involving moral turpitude

& 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] - Controlled substance violation

APPLICATION: Termination; waiver of inadmissibility

AMENDED DECISION[1]

The Board previously issued a decision in this case on May 16, 2006. We reconsider that decision on our motion. See 8 C.F.R, § 1003.2(a) (2006). We vacate our prior order, reinstate the appeal, and issue the following decision which dismisses the appeal.

The respondent has appealed the April 5 , 2005, decision of the Immigration Judge which denied his motion for the Immigration Judge to recuse herself from the case, to suppress evidence, and to terminate the proceedings; found him removable as charged; denied his application for a waiver of inadmissibility under section 212(c) ofthe Immigration and Nationality Act, 8 U.S.C. § 1182(c); and ordered him removed to Mexico. The Department of Homeland Security (DHS, formerly Immigration and Naturalization Service (INS)) urges us to affirm the decision of the Immigration Judge. The appeal will be dismissed. The request for oral argument is denied.

On March 25, 2005, the Immigration Judge issued a detailed decision denying the respondent's motion, and she incorporated this decision into the final order issued on April 5, 2005. On review, we agree with the findings of the Immigration Judge, and adopt and affirm her decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We add the following in response to the arguments raised on appeal.

The respondent argues that the Immigration Judge did not conduct a fair hearing. He asserts that she should have recused herself from the proceedings because she was the District Counsel of the former INS at the time the respondent's proceedings commenced. As discussed in her March 25, 2005, decision, the Immigration Judge had never been directly involved with the respondent's case, and we agree it was fair for her to proceed with this case. Similarly, we agree with the Immigration Judge that her husband's employment as District Counsel of DHS did not provide cause for her to recuse herself from this case. Furthermore, our review ofthe record indicates that the Immigration Judge did actually conduct the hearing in a fair and impartial manner.

On appeal, the respondent specifically challenges the Immigration Judge's decision to admit a "rap sheet" issued by the Federal Bureau of Investigation (FBI) into the record (see Exh. 5). The Immigration Judge acted within her discretion to accept the rap sheet into evidence even though it was not submitted before the hearing in question. Further, the proceedings continued beyond that hearing date, and the Immigration Judge addressed the respondent's objections to the rap sheet in her March 25, 2005, decision. The respondent argues that the Immigration Judge proceeded unfairly in ordering him to appear for fingerprints during the proceedings, which in turn gave rise to the rap sheet. We see nothing fundamentally unfair about the timing of the Immigration Judge's request for the respondent to submit fingerprints. The respondent also challenges the Immigration Judge's failure to require that the DHS inspector who placed the respondent in proceedings appear at the hearing, even though she

initially indicated that she would do so. We find no error here as the documentary evidence of record is sufficient to establish the respondent's inadmissibility to the United States (see Exhs. 2-5).

As found by the Immigration Judge, the certified conviction records and rap sheet establish the respondent's removability as charged. See I.J. Dec., March 25, 2005, at 2-4, 7-8. The respondent's challenges to these documents on appeal are not convincing.

The respondent also challenges the Immigration Judge's decision to deny his application for a section 212(c) waiver because his 1994 conviction for possession of a controlled substance was based on a finding of guilty, rather than a plea (see Exh. 3). The respondent initially argues that it is not clear from the conviction records that no plea was entered. The judgment for this conviction reads "FNDG GUILTY." (Id.). We agree with the immigration Judge that this indicates that no plea was entered in this case. In any event, the respondent had the burden of proof to present evidence of a plea. See 8 C.F.R. § 1240.8(d).

The respondent alternatively argues that even if he did not plead guilty, he should be eligible for section 212(c) relief which was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). As found by the Immigration Judge, there is nothing in *INS v. St. Cyr*, 533 U.S. 289 (2001), which indicates that its reasoning applies to aliens who failed to enter a plea of guilty or nolo contendere. The respondent is therefore ineligible for section 212(c) of the Act. *See also Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004); *Armendariz-Montoya v. Sonchick*, 291 F.3d 1116 (9th Cir. 2002); 8 C.F.R. §

1212.3(h) (2006); *cf. Ponnapula v. Ashcroft*, 373 F.3d 480 (3rd Cir. 2004). The respondent argues on appeal that it violates his rights to bar him from 212(c) because he could have been wrongly convicted. We are not convinced by this speculative argument, and find that the respondent does not fall under the exception set out in *INS v. St. Cyr, supra.*

On appeal, the respondent also argues that his removal amounts to cruel and unusual punishment in violation of the Eighth Amendment. This argument is without merit as removal proceedings are not criminal and do not constitute punishment. *See Flores-Leon v. INS*, 272 F.3d 433, 440 (7th Cir. 2001).

ORDER: The Board's decisions dated May 16, 2006, and May 24, 2006, are vacated.

FURTHER ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

[1] To modify our prior decision, we vacate our order dated May 24, 2006, on our own motion. See 8 C.F.R. § 1003.2(a). Our amended decision is identical to the vacated order with the exception of language now found in the second full paragraph on page three of this decision.